Petition

81-1934

NO. A-762

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUEANNE C. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether The Doctrine Of This Court In *Feres v. United States of America*, 340 U.S. 135 (1950) Bars A Federal Tort Claim Action By The Estate Of A Military Officer Where His Wrongful Death Was Caused By The Intentional Torts Of Marine Corps Agents And Employees Who Sabotaged His Aircraft.

LIST OF PARTIES

Petitioner, Sueanne C. Lewis, Executrix of the Last Will and Testament of Lt. Col. Julius Mack Lewis, U.S.M.C., was the Plaintiff in the United States District Court for the Central District of California and the Appellant before the Ninth Circuit.

Respondent, United States of America was the Defendant in the District Court and the Appellee before the Ninth Circuit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	i
OPINION OF THE NINTH CIRCUIT	1
JURISDICTION OF THIS COURT	1
STATUTE CONSIDERED	2
STATEMENT OF THE CASE	2
ARGUMENT IN SUPPORT OF GRANTING WRIT ..	4
A. This Court Should Decide If *Feres* Precludes Actions Grounded In Intentional Torts	4
B. The Ninth Circuit Erred When It Applied *Feres* To Actions Sounding In Intentional Torts .	5
1. Prior Decisions	5
2. *Feres* Rationale	5
CONCLUSION	7
APPENDIX A	9

TABLE OF AUTHORITIES

Page

CASES

Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 4,6

Feres v. United States, 340 U.S. 135 (1950) i,3,4,5

Harmon v. Brucker, 355 U.S. 579 (1958)..... 6

Indian Towing Co. v. United States, 350 U.S. 61 (1955). 5,6

Rayonier, Inc. v. United States, 352 U.S. 315 (1957) 5,6

Reid v. Covert, 354 U.S. 1 (1956)..... 6

Toth v. Quarles, 350 U.S. 11 (1955)..... 6

United States v. Brown, 348 U.S. 110 (1954) 5

United States v. Muniz, 374 U.S. 150 (1963) 5,6

Citizens National Bank of Waukeegan v. United States, 594 F.2d 1154 (7th Cir. 1979) 4

Jaffee v. United States, 663 F.2d 1226 (3rd Cir. 1981)... 4

Lewis v. United States, 663 F.2d 889 (9th Cir. 1981).... 3,4

United States v. Lee, 400 F.2d 558 (9th Cir. 1968)..... 4

STATUTES

28 U.S.C.

Section 1254(1) 1
Sections 1346, 2671 et seq. 3
Section 2674..... 2
Section 2680(a) 6

TABLE OF AUTHORITIES (Continued)

Page

MISCELLANEOUS

Federal Rules of Civil Procedure 12(b) 3

Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 Michigan L.Rev. 1099 (1977) 6

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OPINION OF THE NINTH CIRCUIT

The opinion of the Ninth Circuit in this matter is reported at 663 F.2d 889 (Ninth Circuit 1981), attached hereto as Appendix A.

JURISDICTION OF THIS COURT

This court is believed to have jurisdiction pursuant to 28 U.S.C. § 1254(1) upon petition for Writ of Certiorari after rendition of judgment. The pertinent dates are:

December 14, 1981: Final decision entered by the United States Court of Appeals for the Ninth Circuit.

March 8, 1982: Extension of time for filing petition for Writ of Certiorari until April 19, 1982 granted by Hon. William H. Rehnquist, Associate Justice of the Supreme Court of the United States.

STATUTE CONSIDERED

The Statute of the United States which this case involves is the following provision of the Federal Tort Claims Act:

> 28 U.S.C. § 2674. Liability of United States
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. (June 25, 1948, c. 646, § 1, 62 Stat. 983.)

STATEMENT OF THE CASE

Petitioner, the widow of Lt. Colonel Julius Mack Lewis, Jr., U.S.M.C., brought this action after the death of her husband in the crash of a Marine Corps plane in El Toro, California on September 26, 1975. Petitioner is the executrix of the will of her deceased husband and represents herself and three minor children in this action.

The plane was maintained and operated by the United States and crashed shortly after take-off from its base at the Marine Corps Air Station at El Toro, California. Petitioner has alleged that the crash resulted from intentional sabotage of the aircraft by Marine Corps personnel.

Petitioner filed an administrative claim against the United States on September 12, 1977 which was denied on November 29, 1977. She filed suit in the United States District Court for the Central District of California on May 17, 1978 pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.* The United States moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b), contending that the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), barred the action because Lt. Col. Lewis' death was incident to military service.

On February 26, 1979 Petitioner filed a First Amended Complaint clarifying the wrongful acts or omissions of the Government employees as intentional acts of sabotage. Petitioner Lewis opposed the Motion to Dismiss contending that the rationale and holding of *Feres* did not apply to intentional torts. The District Court dismissed the action and Lewis appealed.

On December 14, 1981 the Court of Appeals affirmed the Judgment of the District Court stating:

> "*Feres* itself concerned a claim based on negligence. However, the factors which required creation of the doctrine support with equal force its extension to claims of intentional wrongdoing." *Lewis v. United States*, 663 F.2d 889, 891 (1981).

The Ninth Circuit conceded that its decision rested upon the status of the Plaintiff, uncontestedly on active military duty, rather than the status or actions of the tortfeasor. *Lewis, supra*, 663 F.2d at 891.

ARGUMENT IN SUPPORT OF GRANTING WRIT

A.

This Court Should Decide If *Feres* Precludes Actions Grounded In Intentional Torts.

Several Courts of Appeal have decided that this Court's holdings in *Feres* and its progeny preclude not only negligence actions but also actions for intentional torts. *Lewis, supra*, 663 F.2d 889 (Ninth Circuit 1981); *Citizens National Bank of Waukeegan v. United States*, 594 F.2d 1154 (Seventh Cir. 1979); *Jaffee v. United States*, 663 F.2d 1226 (Third Cir. 1981). However, this Court has not considered the issue of intentional torts relative to *Feres*. The volume of cases and the nature of decisions of the Courts of Appeal strongly suggest that certiorari should be granted.

The failure to grant review will cause the continuing disenfranchisement of military personnel and their dependents from recourse in the federal courts. The harms complained of are gross in degree and their court sanctioned actions are obnoxious to basic concepts of fundamental justice. Indeed, the factual circumstances in *Lewis* concern sabotage of an aircraft; *Waukeegan* concerns a physical assault by later convicted Marine Corps guards leading to the suicide of a young recruit, *Waukeegan, supra*, 594 F.2d at p. 1155; the facts of *Jaffee* indicate an intentional exposure to nuclear radiation by military superiors.

Currently, *Feres* bars actions under FTCA against the government. Actions against individuals for torts committed incident to military service have also been barred, *e.g. United States v. Lee*, 400 F.2d 558 (Ninth Cir. 1968), *cert. denied* 393 U.S. 1053 (1969); C.f. *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Thus, military personnel and their survivors are without remedy for intentional torts perpetrated against servicemen which may be "incident" to military service.

Only review by this Court can determine if the proper application of *Feres* depends upon the nature of the tort or the status of the plaintiff.

B.

The Ninth Circuit Erred When It Applied *Feres* To Actions Sounding In Intentional Torts.

1. Prior Decisions

In the seminal case of *Feres v. United States*, 340 U.S. 135 (1950) this Court considered three consolidated negligence actions brought under the then recently enacted FTCA for injuries sustained incident to military service. The *Feres* doctrine represents the only judicially created exception to the government's sovereign immunity waiver. Each subsequent invocation of the doctrine by this Court has been explicitly limited to negligence actions.[1]

Subsequent cases which limited the holding of *Feres* to its soldier-superior, military discipline rationale, were also predicated upon negligence. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957); *United States v. Muniz*, 374 U.S. 150 (1963).

2. *Feres* Rationale

The same cases limiting the holding of *Feres* to negligence have also operated to narrow its rationale such that only the need for military

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[1] "We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to *negligence*" (emphasis added). *Feres, supra*, 340 U.S. at p. 159; and

"The *Feres* decision . . . the *negligence* alleged in each case was on the part of other members of the Armed Forces." (Emphasis added) *United States v. Brown*, 348 U.S. 110, 111-112 (1954).

autonomy justifies the invocation of the doctrine. *Indian Towing, supra*; *Rayonier, supra*; *Muniz, supra*.

Yet, these concerns are wholly inapplicable in the case at bar because discretionary decisions with the chain-of-command are not in issue, nor subjected to the courts' review. No justifiable policy of military autonomy would be served by allowing military authorities a *carte blanche* to commit intentional torts upon either fellow officers or enlisted men. Review of discretionary decisions would be precluded by the "discretionary function" exception embodied in 28 U.S.C. § 2680(a).

Moreover, this Court has substantially defined the operative factors which subject military decision making to judicial review with little appreciative affect on military relationships. *Reid v. Covert*, 354 U.S. 1 (1956); *Toth v. Quarles*, 350 U.S. 11 (1955); *Harmon v. Brucker*, 355 U.S. 579 (1958). These judicial restrictions on military disciplinary authority are equally as disruptive as FTCA actions brought for intentionally tortious conduct would likely be.

The decision of the Ninth Circuit focuses narrowly on the status of the plaintiff rather than considering the totality of the circumstances surrounding the claim. The Court fails to consider the military "necessity" for the tort; the nature of the tort itself, the relationship of the injured to the tortfeasor, *i.e.* officer-enlisted man, or other factors relevant to a determination of the nexus of the conduct to military disciplinary requirements.[2]

Moreover, the soldier or his survivors are deprived of recourse to the federal courts for intentional torts in a manner contrary to civilians. C.f., *Bivens, supra*, 403 U.S. 388, an arguably invidious distinction.

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[2] See, *generally, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 Michigan L.R. 1099, 1126 (1977).

CONCLUSION

For the foregoing reasons, Petitioner Sueanne C. Lewis respectfully prays that this Court grant this petition for Writ of Certiorari to review the Judgment and Opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

*WILLIAM A. DOUGHERTY

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*Counsel of Record

Appendix

Sueanne C. LEWIS, Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 79-3276.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 2, 1981.

Decided Dec. 14, 1981.

Action was brought under the Federal Tort Claims Act to secure damages for the wrongful death of a marine corps pilot. The United States District Court for the Central District of California, William P. Gray, J., dismissed the action, and appeal was taken. The Court of Appeals, Hug, Circuit Judge, held that the Government is not liable for injuries sustained by military personnel during activities incident to military service, even if such injuries are caused by the intentional acts of government employees.

Affirmed.

1. United States 78(16)

Government is not liable for injuries sustained by military personnel during an activity incident to military service, even if such injuries are caused by the intentional acts of government employees. 28 U.S.C.A. §§ 1346(b), 2671—2680.

2. United States 78(16)

General liability created by Federal Tort Claims Act, which constitutes the government's consent to suits arising from wrongful conduct of federal employees, is limited by Supreme Court's *Feres* doctrine, in which case the Supreme Court held that no governmental liability exists under the FTCA for injuries to servicemen where the injuries arose out of

or were in the course of activity incident to service. 28 U.S.C.A. §§ 1346(b), 2671—2680.

3. United States 78(16)

Limitation of governmental liability in the military context, notwithstanding the Federal Tort Claims Act, is necessary for three reasons, viz., the "distinctively federal" nature of the relationship between government and members of military, the provision of alternate remedies to suit, and the effect of maintenance of suits on military discipline. 28 U.S.C.A. §§ 1346(b), 2671—2680.

4. Statutes 220

Silence of Congress subsequent to the Supreme Court's *Feres* decision, which excepted from scope of the Federal Tort Claims Act claims against the Government for injuries sustained by military personnel during an activity incident to the service, constitutes an affirmation of the *Feres* doctrine and of the policies that support it. 28 U.S.C.A. §§ 1346(b), 2671—2680.

Richard L. Chesney, Wells & Chesney, Oakland, Cal., for plaintiff-appellant.

Dzintra I. Janavs, Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before HUG, SCHROEDER and NELSON, Circuit Judges.

HUG, Circuit Judge:

[1] This action was brought under the Federal Tort Claims Act,[1] to secure damages for the wrongful death of a Marine Corps pilot. It presents the question whether the *Feres* doctrine bars claims against the

1. 28 U.S.C. §§ 1346(b), 2671—2680 (1976 & Supp. 1978).

government for injuries sustained by military personnel during an activity incident to service when those injuries are caused by the intentional acts of government employees. We hold that the policies supporting the *Feres* doctrine require that it also bar intentional tort claims asserted against the government by military personnel.

I

The widow of Lt. Colonel Julius Mack Lewis, Jr. brought this action after he died in the crash of a Marine Corps plane in El Toro, California on September 26, 1975. She alleged that the crash was caused by the "negligence or wrongful acts or omissions" of government employees in maintaining, operating, and controlling the aircraft. In her first amended complaint, these wrongful acts were characterized as sabotage. Lewis also alleged that her administrative claim for damages totaling $10,000,000.00 had been denied by the Government.

The United States moved for dismissal, arguing that because Lt. Colonel Lewis died in the course of an activity incident to military service, the claim was barred by the doctrine developed by the Supreme Court in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). In opposing the government's motion, Lewis contended that the rationales supporting the application of *Feres* to negligence cases did not require its extension to intentional torts. She relied upon an analogy to the California workers' compensation laws. Although that state's benefit scheme bars tort recovery against employers for work-related injuries, some California courts have recognized intentional tort claims asserted against employers. Lewis urged the district court to take the same view of the Federal Tort Claims Act as limited by the *Feres* doctrine. The court dismissed the action and Lewis appeals.

II

[2, 3] The Federal Tort Claims Act ("FTCA") constitutes the government's consent to suits arising from the wrongful conduct of federal employees. The general liability created by the FTCA is limited by the

doctrine announced in *Feres*. In that case the Supreme Court held that no governmental liability exists under the FTCA "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146, 71 S.Ct. at 159. In a more recent application of the *Feres* doctrine, the Court concluded that a limitation of liability in the military context is necessary for three reasons: (1) the "distinctively federal" nature of the relationship between the government and members of the military; (2) the provision of alternate remedies to suit; and (3) the effect of maintenance of suits on military discipline. *Stencel Aero Engineering Corporation v. United States*, 431 U.S. 666, 671-73, 97 S.Ct. 2054, 2057-59, 52 L.Ed.2d 665 (1977).

[4] *Feres* itself concerned a claim based on negligence. However, the factors which required creation of the doctrine support with equal force its extension to claims of intentional wrongdoing. At the time the doctrine was enunciated, the *Feres* court stated that if the doctrine misconstrued Congress's intent in enacting the FTCA, the Act could be amended to consent expressly to liability for wrongful acts of military employees. *Feres*, 340 U.S. at 138, 71 S.Ct. at 155. We join the Seventh Circuit in viewing Congress's silence as an affirmation of the doctrine and of the policies that support it. *See Citizens National Bank of Waukegan v. United States*, 594 F.2d 1154, 1157-58 (7th Cir. 1979). We therefore conclude we must apply the same policy factors to the instant case.[2]

III

The first consideration, the distinctly federal nature of the relationship between the government and members of the military, looks to the importance of having a uniform body of law governing claims asserted against the military. Under the FTCA, the law applied is that of the place of the wrongful act or omission. 28 U.S.C. § 1346(b) (1976). The Court in *Feres* reasoned that a plaintiff's ability to assert a claim should not be

2. *See Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981) criticizing the rationale for the application of these policy factors.

dependent upon the state in which the military has stationed him and whether that state's substantive law recognizes his claim. It concluded that liability could not be based upon geographical fortuity, but must be controlled by federal standards. *Feres*, 340 U.S. at 143-44, 71 S.Ct. at 157-58. *See Citizens National Bank*, 594 F.2d at 1157. Unquestionably this concern applies equally to negligence and intentional tort claims.

The second factor is also clearly applicable to individuals who sustain death or physical injury caused by an intentional tort. Alternate statutory remedies compensate members of the military for service-related injuries. Under 10 U.S.C. §§ 1475-1488 (1976) death benefits are made available to survivors of persons who die during active duty. Personal injuries suffered during active service are compensable under 38 U.S.C. §§ 331-337 (1976). These statutes provide "no-fault" compensation as a substitute for a tort action under the FTCA.

The final factor we must consider is the effect of litigation upon military discipline. In *Henninger v. United States*, 473 F.2d 814, 815-16 (9th Cir.), *cert. denied*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973), we declined to make fine distinctions between different types of negligence claims to determine their effect on discipline. Adoption of such a rule would involve the trial court in "second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel*, 431 U.S. at 673, 97 S.Ct. at 2059. This factor is thus focused upon the appropriate role of the court in reviewing military orders. Interjection of the court system into military relationships in the event of an intentional tort claim would be no less destructive of discipline.

The language of *Feres* itself does not support an effort to distinguish negligence from intentional torts. The Court concluded that governmental immunity existed as to claims "for *injuries* to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159 (emphasis added.) No limitation

was imposed as to the types of injuries involved.[3] *See Thornwell v. United States*, 471 F.Supp. 344, 348 (D.D.C. 1979). This court, in applying the *Feres* doctrine to negligence claims, has held that the critical determination is the status of the plaintiff, rather than the status or actions of the tortfeasor. *Uptegrove v. United States*, 600 F.2d 1248, 1249-50 (9th Cir. 1979), *cert. denied*, 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980); *Calhoun v. United States*, 475 F.Supp. 1 (S.D.Cal. 1977), *aff'd. per curiam*, 604 F.2d 647 (9th Cir. 1979), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1029, 62 L.Ed.2d 761 (1980); *See also Rotko v. Abrams*, 338 F.Supp. 46, 47 (D.Conn. 1971), *aff'd. per curiam*, 455 F.2d 992 (2d Cir. 1972). The rule we adopt here is consistent with that principle.

The Government argues that Lewis stated a claim under one of the intentional tort theories excluded by the FTCA, 28 U.S.C. § 2680(h) (1976). Because we affirm dismissal under *Feres*, we need not reach that issue. For the same reason, we need not address whether the alleged acts of sabotage fell within the scope of employment of the Marine Corps employees. *See* 28 U.S.C. § 1346(b) (1976).

The judgment of the district court dismissing the action is AFFIRMED.

3. We do not view the reference in *Feres* to *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 13 L.Ed. 1036 (1851) as such a limitation. *See* 340 U.S. at 141 n.10, 71 S.Ct. at 157. *Dinsman* concerned an intentional tort claim asserted against an individual officer. *Feres*, like the instant case, concerned claims against the Government under the FTCA. We are not here concerned with claims against individuals.

Opposition

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Citizens National Bank of Waukegan v. *United States*, 594 F. 2d 1154 4

Feres v. *United States*, 340 U.S. 135 ..... 1, 2, 3, 4

Hatzlachh Supply Co. v. *United States*, 444 U.S. 460 3

Jaffee v. *United States*, cert. denied, No. 81-1346 (May 17, 1982) 2

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, No. 80-203 (May 3, 1982) 4

Rostker v. *Goldberg*, 453 U.S. 57 2

Rotko v. *Abrams*, 455 F. 2d 992, aff'g and adopting 338 F. Supp. 46 4

Saxbe v. *Bustos*, 419 U.S. 65 4

Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 ..... 2, 3

United States v. *Brown*, 348 U.S. 110 2

United States v. *Muniz*, 374 U.S. 150 ..... 2, 4

United States v. *Standard Oil Co.*, 332 U.S. 301 3

Statutes:

Federal Tort Claims Act:

28 U.S.C. 1346(b) 3

28 U.S.C. 2680(a) 4

28 U.S.C. (1970 ed.) 2680(h) 4

Page

Statutes—Continued:

Veterans' Benefit Act of 1958, 38 U.S.C. 101 *et seq.* 3

Pub. L. No. 93-253, §2, 88 Stat 50 (1974) 4

Miscellaneous:

H.R. Rep. No. 97-384 (Pt. 1), 97th Cong., 1st Sess. (1981) 4

S. Rep. No. 93-588, 93d Cong., 1st Sess. (1973) 4

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner is the widow of a serviceman who was killed, while undisputedly on active duty, in the crash of a United States Marine Corps airplane (Pet. App. A-3; Pet. 3). She brought this action under the Federal Tort Claims Act in the United States District Court for the Central District of California, initially alleging that the crash was caused by the "negligence or wrongful acts or omissions" of government employees (Pet. App. A-3). She then amended her complaint to allege that the accident was the result of government employees' intentional sabotage (*ibid.*). The district court held that *Feres* v. *United States*, 340 U.S. 135 (1950), required that petitioner's claim be dismissed, and the court of appeals affirmed. Petitioner contends that *Feres*, which bars servicemen's suits against the United States for damages resulting from service-related injuries, applies only to suits alleging negligent injuries, not to claims of intentional tort.

1. The principal basis of *Feres* is " '[t]he peculiar and special relationship of the soldier to his superiors [and] the effects of the maintenance of such suits on discipline * * *.' " *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671 (1977), quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954); see *United States* v. *Muniz*, 374 U.S. 150, 162 (1963). Claims alleging intentional torts have at least as much potential for disrupting military discipline and organization as claims alleging negligence; both require the courts to "second-guess[] military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions" (*Stencel Aero Engineering Corp.* v. *United States, supra*, 431 U.S. at 673). As we explained in our Brief in Opposition in *Jaffee* v. *United States*, cert. denied, No. 81-1346 (May 17, 1982), perhaps the most distinctive aspect of military life is precisely that decisions are made intentionally to expose servicemen to grave risks (81-1346 Br. in Opp. 6-7).[1] Thus, suits alleging intentional torts are, if anything, more inappropriate in a military context than suits based on negligence. See also *Rostker* v. *Goldberg*, 453 U.S. 57, 65-66 (1981).

Moreover, creating an exception to *Feres* for intentional torts would encourage plaintiffs to try to avoid the limitations of *Feres* by artful pleading. In this case, for example, petitioner apparently decided to characterize the government's alleged wrong as intentional sabotage, instead of negligence, precisely to escape *Feres*. *Feres* is intended to avert the harmful effects not just of judgments against the

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[1] In *Jaffee*, the Court declined to review the claim of a serviceman who sought damages from his superiors for alleged intentional violations of his constitutional rights, and who attempted to escape the limitations implicit in *Feres* by making an argument similar to petitioner's. We are sending petitioner a copy of our Brief in Opposition in *Jaffee*.

government but of allowing a servicemen to hale his superiors or fellow servicemen into court (see, *e.g.*, *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 676 (Marshall, J., dissenting)). Hence creating the exception petitioner seeks would go far toward removing the protection *Feres* is intended to provide.

2. As the court of appeals stated (Pet. App. A-4 to A-5), the other bases of *Feres* also apply equally well to claims of intentional tort. For example, a second basis for the *Feres* doctrine identified in *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 672-673, is the exclusivity of the remedies provided by the Veterans' Benefits Act of 1958, 38 U.S.C. 101 *et seq.* See *Feres* v. *United States, supra,* 340 U.S. at 144. See also *Hatzlachh Supply Co.* v. *United States,* 444 U.S. 460, 465 (1980). The Veterans' Benefits Act "serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but * * * also * * * provides an upper limit of liability for the Government as to service-connected injuries" (431 U.S. at 673). But the Veterans' Benefits Act does not treat service-related injuries allegedly caused by intentional conduct differently from other injuries. Similarly, the Federal Tort Claims Act makes the government liable "in accordance with the law of the place where the [allegedly tortious] act or omission occurred" (28 U.S.C. 1346(b)), and the Court noted in *Feres* that Congress could not have intended variable state law to govern the " 'distinctively federal' " relationship between the government and its soliders (340 U.S. at 143, quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305 (1947)). There is no reason to believe that state law governing intentional torts is less variable than the state law of negligence.

3. Petitioner points out (Pet. 5 & n.1) that the *Feres* doctrine has been phrased in terms of negligence. But at the time *Feres* was decided, the FTCA did not waive the

government's sovereign immunity for intentional torts. See 28 U.S.C. (1970 ed.) 2680(h). Indeed, when the Court refused to extend *Feres* to suits by prisoners for injuries sustained during their imprisonment, it justified its holding in part by noting that "the Government is not liable for the intentional torts of its employees * * * for which prisoners might be especially tempted to initiate retributive litigation." *United States* v. *Muniz, supra,* 374 U.S. at 163.

Petitioner also suggests (Pet. 6) that the *Feres* doctrine itself may be mistaken. She urges that the "discretionary function" exemption to the FTCA (28 U.S.C. 2680(a)) adequately protects military decisions from unwarranted judicial examination and that courts intercede in military affairs in other contexts. But *Feres* is a long-standing construction of a federal statute, and despite the Court's explicit suggestion in *Feres* that Congress might disapprove its ruling (340 U.S. at 138), Congress has not questioned it. Indeed, when Congress amended the FTCA in 1974 to allow certain actions for intentional torts to be brought against the United States (Pub. L. No. 93-253, Section 2, 88 Stat. 50), it gave no indication that *Feres* should not apply to intentional torts. See S. Rep. No. 93-588, 93d Cong., 1st Sess. 2-3 (1973). This is strong evidence of congressional endorsement. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* No. 80-203 (May 3, 1982), slip op. 28; *Saxbe* v. *Bustos,* 419 U.S. 65, 74 (1974); *Citizens National Bank of Waukegan* v. *United States,* 594 F. 2d 1154, 1158 n.9 (7th Cir. 1979). More recently, Congress explicitly indicted its approval of *Feres.* See H.R. Rep. No. 97-384 (Pt. I), 97th Cong., 1st Sess. 5 (1981).[2]

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[2]As petitioner acknowledges (Pet. 4), there is no conflict among the circuits on this issue. See, *e.g., Citizens National Bank of Waukegan* v. *United States, supra; Rotko* v. *Abrams,* 455 F. 2d 992 (2d Cir. 1972), aff'g and adopting 338 F. Supp. 46 (D. Conn. 1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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